

East Longmeadow Zoning Board of Appeals

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Present were: Chair, Mark Beglane; Clerk, Charles Gray, Alfred Geoffrion and Frances Dean. John Garwacki and Brian Hill were not present

Continuation Appeal Hearing - Rosemarie Gay, H.R. Wellness, 75 North Main Street

Chair, Mr. Beglane said that only four members were present that evening and if the Board makes their decision that evening it has to be a unanimous vote. Mr. Beglane said that they wanted to give the applicant the opportunity to proceed or wait until there are five members.

Attorney Guiel said that he thinks they are prepared to go forward. He said that Ms. Gay has been in limbo for a while now and if the by-law passes at the town meeting to allow Massage Therapy in a Commercial Zone that would be good. He said however they also know that if they depend solely on that it and doesn't pass then she will have no rights. Attorney Guiel said at this point they feel that she does more than massage therapy. He said that she is not a Massage Therapist she is a Holistic Provider of Health Services. Attorney Guiel said as result whether Massage Therapy is allowed in a Commercial Zone or not with that being said if she uses a small auxiliary service to do what she does then she would be allowed to operate in that zone. He said that Ms. Gay would like to address the Board and explain further what she does and why she feels she qualifies as a professional.

Rosemarie Gay, 75 North Main Street said that she knows that it is hard to put her in a box because Wellness Centers are pretty new. She said the she has an integrated complimentary practice also classified as a Wellness Center. Ms. Gay said that they consult ways to prevent illness, stress and improve health and that hospitals, dental offices, cancers centers, primary care physicians, etc. are all forming partnerships with estheticians; nail technicians acupuncturists, massage therapist and aroma therapists. She said those two things that used to be separate are merging. Mr. Beglane said that he thinks the by-laws allow that as long as they are under the auspices of a doctor or other professional. Ms. Gay presented to the Board from the East Longmeadow website and under the Health & Wellness there is a link to the National Institution of Senior Health. She said that it is a government organization that researches how allopathic medicine and complimentary medicine work together.

Ms. Gay said basically licenses and certifications in those areas haven't been talked about before and part of the reason is it is getting so big in our country is that there is a big shortage of doctors. She said some of her certifications are through hospitals and that wellness centers work with all kinds of doctors and just wanted to summarize it for the Board. Ms. Gay said originally she was given approval by the town before to operate her business and said that they may not have had the original paper because she had a name change. She said her business was originally a wellness Center and granted permission to work in a commercial zone and she believed with all her heart that was she was supposed to be there.

Mr. Beglane said he is trying to understand on the Aroma Therapy the information she provided is from test that she took, is that correct?

Ms. Gay said correct and said that she has much more certifications than just that. She said that she leased and renovated a space at the end of that renovation she got a notice that was somebody else's mail and it was for a Special Permit and she contacted Ms. Macdonald at that time. Ms. Gay said that when she went to town hall to give her change of address for the business and get the Special Permit application she found out she wasn't supposed to be there. She said she made a huge investment in the business and received the cease & desist order, she appealed because a wellness center has so many different parts. Ms. Gay said there is no terminology for professional in the zoning by-laws and going by the legal dictionaries she does feel that she qualifies as professional. She said that she is fully licensed, she conducts herself in a professional manner, she has code of ethics and they have standards of practice. Ms. Gay said that she is considered an allied health professional as far as the legal definition and she said that she is also a wellness consultant and does consulting with every patient.

Mr. Beglane asked Ms. Gay if she has a breakdown of how much of her business is related to aroma therapy, massage therapy, skin care and nail care. He said one of the issues that the Board needs to try and determine is what she does mainly, is it more professional or is more like a personal service business. Mr. Beglane said that he asked Ms. Macdonald to find out what the state requires for licensing and she was able to get that from the state.

Ms. Gay said the hard part about wellness is that everything converges and when they work on a patient everything kind of merges. Mr. Beglane said he understands but he assumes when he is working through doctors and sends bills does it have to be coded a certain way to be paid by the insurance. Ms. Gay said that massage is the only thing covered under insurance and said that she had a doctor for 6 years in her practice and in December two of her doctors left and it's the first time she has been without a doctor so the Board caught her at a time when she is really vulnerable. She said that she has a doctor on her staff who is dentist and dentists can run wellness centers. Mr. Beglane said that the Board understands that and if she were a doctor or a dentist they would be there that evening. He said the issue is that she is running sort of an independent quote "Wellness Center" and where does that fall in the continuum between of a professional that is an allowed use and personal service that is not allowed in that district. Mr. Beglane said what the Board is trying to determine is what percentage of the business

is related to skin care. Ms. Gay said her biggest thing is wellness consulting and skin care and she does less than 4 percent of massages and she said that it's hard for her to break it down. Mr. Beglane asked Ms. Gay if she does mostly consulting. Ms. Gay said that consulting is always done with a service unless it is a new person then they go through their whole medical history. Mr. Beglane said if he went to her and she told him what he needs to do and he doesn't necessarily have to go back to her for treatment but his question is how much would she say is just consulting. Ms. Gay said that almost everybody goes back to her after consulting for services. Mr. Beglane asked if on a follow up visit is there more consultation. Ms. Gay yes there is because everybody needs some kind of consultation and would say that consulting is over 50 percent.

Mr. Beglane said that he was just trying to figure it out because Ms. Gay is asking the Board to make a determination if she is a professional. He said he personally considers a professional the state mandated a certain amount education and a certain code of ethics.

Attorney Guiel asked in fairness should they have to guess as to what they mean by the by-laws. Mr. Beglane said that he understands but he is trying to determine where Ms. Gay falls on the continuum, does she fall closer to the personal service business or does she fall under the professional because he doesn't know what she does. Attorney Guiel said that is what they were trying to explain to them and he said the by-laws are vague and through no fault of them they are stuck having to try and interpret them. He said the by-laws were drafted in the 60's when a doctor was a professional and somebody who wasn't a doctor wasn't considered a professional. Mr. Beglane said that they are trying to figure out where Ms. Gay falls in that continuum.

Mr. Beglane asked Ms. Gay how much of her business is direct referrals from doctors and hospitals. Ms. Gay said that is a hard question to answer because she is referred to them and they refer back to her.

Mr. Geoffrion asked Ms. Gay if she has a formal affiliation with a licensed medical provider. Ms. Gay said yes the doctor that is on her staff. Mr. Geoffrion said that he thinks the by-law requires that it's not that somebody is consulting with her it is that she has to be working for them.

Attorney Guiel said that Ms. Gay worked for 38 years as a medical assistant in surgery before she went into the her business. He said that she has over 6 years of education in those health areas and he said that she is clearly not a massage therapist in the traditional sense and that is what the whole issue arose over.

Mr. Gray asked Attorney Guiel if he was able to find any case law. Attorney Guiel said no. Mr. Gray said the last time they met the last thing the Board said was that he was going to go out and try and find some case law. Attorney Guiel said that he did not find any because case law would need to be specific to the by-laws to the town. Mr. Gray said that they could apply how a court views a profession and said that he said the by-law was written 30 years ago the nature has changed. He said the Board is looking for guidance and he said that he personally would like to try everything he can to try and

help Ms. Gay. Mr. Gray said that he is struck trying to interpret it and any help that she can provide would be helpful. Attorney Guiel said that he was not able to find a case law and he tried. He said two things he would like show as exhibits is that Ms. Gay did register in a business zone to run her business going back to 2007. Attorney Guiel said that Ms. Gay operated in those zones without interruption, without complaints, without action from the town telling her that she was not operating in a proper zone. Mr. Beglane said that was at 280 North Main. Attorney Guiel said correct and he said the letter from the Building Commissioner that brought them there that evening basically said that Ms. Gay had to cease & desist conducting massage. He said that it didn't say that she had to decrease her holistic practice. Mr. Beglane said that he would like the following exhibits entered into the record:

- Exhibit 1: East Longmeadow, MA Official Website – Health & Wellness for Council on Aging
- Exhibit 2: NIH Senior Health: Complementary and Alternative Medicine
- Exhibit 3: NCBTMB Letter of passing the National Certification Examination for Therapeutic Massage & BodyWork.
- Exhibit 4: Certificate for Massage Therapist
- Exhibit 5: Australasian College of Health Sciences Assignment Assessment Sheet for Aroma Therapy
- Exhibit 6: Certificate for Aromatherapy and Herbal Studies showing completion of fifty hour training in Aromatherapy
- Exhibit 7: Usui Shiki Ryoho Reiki Certificate
- Exhibit 8: Certificate of Merit – Wellness Consultant for Body Wrap Treatments and Skincare Facial Treatments
- Exhibit 9: Letter from John Salius, DDS stating that he agreed to serve a Director of Education and Health Advisor for H.R. Wellness
- Exhibit 10: Copy of Code of Ethics – National Certification Board for Therapeutic Massage and Bodywork
- Exhibit 11: Copy of Standards of Practice – National Certification Board for Therapeutic Massage and Bodywork
- Exhibit 12: Copy of Expired Business Certificate for 280 North Main Street
- Exhibit 13: Copy of Change of Business Name dated July 5, 2007 for 280 North Main Street
- Exhibit 14: Copy of Web results for H.R. Wellness Center and Spa <http://hrwellness.us/>

- Exhibit 15: Copy of Licenses for Aesthetician Type 7; Manicurist Type 3; Massage Therapist and certificate of Therapeutic Massage and Bodywork
- Exhibit 16: Copy of 240 CMR 2:00 Licensure of Cosmetologists, Manicurists, estheticians, Demonstrators and Instructors
- Exhibit 17: Copy of 5 Steps to Becoming a Holistic Health Practitioner
- Exhibit 18: Copy of cover of Milady Standard Esthetics: Advanced
- Exhibit 19: Copy of web page legal definition of consultants
- Exhibit 20: Copy of web page legal definitions for Allied Health Professional

Mr. Beglane explained to Ms. Gay that he was just trying to get a continuum because he doesn't know where it begins or ends. He asked if her clients pay for their services. Ms. Gay said yes that they don't do billing and said that they can do billing for massage but they chose not to because insurance companies have them write-off so much of the cost. Mr. Beglane asked Ms. Gay if she has a fee schedule. Ms. Gay said they have a skin consultation and the fees for consultation are all available on her web page. Mr. Beglane asked Ms. Gay if she charges an hourly rate. Ms. Gay said she has a \$60.00 per hour charge.

Ms. Gay said that she is a small business and had she not got that she would have not been in the situation she is in. She said that is really tough losing her life savings because they don't know where she belongs. Ms. Gay said at one time a beauty shop didn't have a zone and they had to assign that and she said that there is nothing wrong with starting that process now .

Mr. Beglane said that would be something that goes before Planning Board and ultimately goes before town meeting for a zone change. He said that someone could recommend it and she has just as much right as any other citizen in town to start a petition. Mr. Beglane said that she could get the owner of the property to start a petition to do a zone change to allow that in that particular zone. At that time he addressed the audience for any questions.

Ralph Page, 306 Prospect Street asked as far as the cease and desist that is what they are looking at to over turn strictly massage therapy. Mr. Beglane said yes but that Ms. Gay is saying that is incidental to a professional office use therefore it should be allowed. He said that the Board is trying to find out if she is a professional because she is claiming to be professional and if she is a professional and it is incidental to a professional use.

Ms. Macdonald said when the Building Inspector ordered the cease & desist he specifically stated Section 3.075 which is personal service shop which massage therapist fell under at the time of that. She said that it was not only that but the entire section 3.075. and asked Mr. Hellyer if that was correct.

Dan Hellyer, Building Inspector said that he sited Ms. Gay for massage pallor under 3.075 and she came in for a Special Permit.

Mr. Page said he whole issue was trying to decide whether Ms, Gay is a massage therapy salon or not. Mr. Beglane said no that they are trying to determine if she falls within the definition of a professional under the zoning by-laws because it is an allowed use under that district. He said if she is a professional then she can do all those things as part of her professional license and if she is not a professional then she can't do those things. Mr. Beglane said that Ms. Gay's argument is that she is a professional and she meets the requirements of professionals. Mr. Page said the by-law that was just passed as far as massage therapy salon someone can have a personal care facility such as a hair salon and they have a massage therapist in their shop. He said that he is a member of the Planning Board and they had to come before the Board to get a license as a massage therapy salon. Mr. Page said that they needed a state license not only for the salon but also for the practitioner. Mr. Beglane said right that is in a business zone and she is not in a business zone and the Zoning Board does not have ability to grant the permit in a business zone.

Upon motion duly made by Charles Gray and seconded Frances Dean, the Board voted (3-1) to overturn the decision of the Building Inspector/Zoning Enforcement Officer. After hearing all the parties and reviewing the evidence that the business was not an allowed use in the Commercial District and because it would take a unanimous vote, the end decision was to uphold the Building Inspector/Zoning Enforcement Officer's decision.

There being no further business the meeting was adjourned at 8:15 p.m.

For the Board

Charles Gray, Clerk